No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVIERA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act's exemption for certain "contracts of employment" encompasses independent contractor agreements.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. This case is important to Cato because it concerns the freedom of individuals and businesses to structure their economic relations through contractual agreement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1 of the Federal Arbitration Act excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The court below rejected the view that the term "contracts of employment" includes only (literally) "contracts of employment"—that is, con-

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[1] Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

tracts establishing traditional employer–employee relationships—and instead interpreted it to encompass any and all "agreements to perform work," including "agreements of independent contractors to perform work." Pet. App. 25a, 27a.

The Congress that enacted the FAA in 1925 intended no such thing. At that time, as today, statutory terms such as "employment" were universally understood to refer to agreements establishing traditional employer–employee relationships according to the principles of common law that evolved over the centuries. Congress knew that because it enacted (and would go on to enact) a series of statutes relying on that common law understanding of terms such as "employment." Congress also knew and expected that the federal courts would interpret its handiwork in that manner because that is what the courts had repeatedly said that they would do, thereby providing Congress a foundational principle upon which to legislate.

That words such as "employment" referred specifically to traditional employer–employee relationships was not an obscure principle. To the contrary, it was reflected in practically every state workmen's compensation scheme enacted in early decades of the Twentieth Century. Some states defined terms such as "employment," "employer," and "employee" expressly by reference to common law concepts, while others left them undefined so as to achieve the same result. Both kinds of statutes addressed liability concerning independent contractors and their workers

separately, because legislators knew that general provisions addressing traditional employees would *never* be understood to reach independent contractors. The common understanding of what these terms meant was that clear.

That Congress meant what it said in the FAA is not just a matter of presumption, but of fact. As a historical matter, Congress crafted the Section 1 exemption to avoid unsettling "established or developing statutory dispute resolution schemes covering specific workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Those schemes applied only to employees, not to independent contractors. The statutory history reflects that those employees—and not some broader class of workers—were Congress's focus in drafting what became the Section 1 exemption.

Language and history both confirm that Congress used the term "contracts of employment" for a reason and that it meant what it said, targeting employees, not anyone else. Accordingly, the decision of the court below should be reversed.

ARGUMENT

I. At the Time of the FAA's Enactment, "Contracts of Employment" Referred to Traditional Employer–Employee Relationships, Not Independent Contractor Arrangements

In 1925, as today, "contracts of employment" referred to agreements establishing traditional employer–employee relationships. The courts presumed as much in interpreting federal and state statutes. Congress and state legislatures presumed as much in enacting statutes—both when they relied on that presumption in statutes that do not expressly define terms such as "employment" but unmistakably intended that precise meaning, and when they went beyond such words so as to also reach independent contractor agreements. Courts embraced the same distinction in applying the common law, as did the legal dictionaries and learned treatises of the time. On this point, the FAA's text is plain: only certain agreements establishing traditional employer–employee relationships are exempt from the FAA's scope.

A. The Congress that Enacted the FAA Was Well Aware that Courts Construe Words Such as "Employment" To Refer Only to Traditional Employer–Employee Relationships

"Where Congress uses terms that have accumulated settled meaning under...the common law, a

court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Statutory terms such as "employment" have such a well-established meaning, referring to traditional employer–employee relationships. This Court has recognized as much since at least 1915.

Robinson v. Baltimore & Ohio R. Co. required the Court to interpret the terms "employee" and "employed" as used in the Federal Employer's Liability Act, enacted in 1908. 237 U.S. 84 (1915). A provision of that statute rendered void contractual provisions releasing a rail carrier from certain liabilities to "employees" of the carrier who were "employed" by it. *Id.* at 91 (quoting statute). After a Pullman car porter hired by the Pullman Company was injured in a collision, he sued the train's carrier, which in turn cited the liability release in his contract. *Id.* Whether the Act applied therefore turned on whether the porter was "employed" by the carrier under FELA. The statute lacking any definition of the relevant terms, the Court presumed that "Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." *Id.* at 94. And the porter's claim against the carrier failed because it was Pullman, not the carrier, that "selected [the porters], defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its

pleasure"—the hallmarks of a traditional employer–employee relationship. *Id.* at 93.

The Court considered itself bound to respect Congress's decision not to extend FELA's protections beyond such employees. After all, Congress knew well "that there were on interstate trains persons engaged in various services for other masters," but it "did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." *Id.* at 94.

Likewise, in *Hull v. Philadelphia & Reading R. Co.*, the Court recognized that, between two rail carriers potentially liable under FELA for the death of a brakeman, liability was properly placed on the one with whom he had "the conventional relation of employer and employee." 252 U.S. 475, 479 (1920). And in *Linstead v. Chesapeake & O. Ry. Co.*, the Court again looked to traditional indicia of employment—payment rates, work rules, immediate supervision, control, etc.—to determine which of two carriers was liable for a conductor's death. 276 U.S. 28, 33–34 (1928) (applying common law approach of *Standard Oil Co. v. Anderson*, 212 U.S. 215, 228–29 (1909)); *see also Baker v. Texas & P. Ry. Co.*, 359 U.S. 227, 228–29 (1959) (per curiam) (same, and referring to sections of the Restatement (Second) of Agency dealing with the borrowed-servant doctrine and the general master–servant relationship); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323–31 (1974) (same).

The rule that statutory terms such as "employment" refer to traditional employer–employee relationships is not limited to FELA. *Community for Creative Non-Violence v. Reid*, for example, involved the Copyright Act's "work for hire" provision governing "'work[s] prepared by an employee within the scope of his or her employment.'" 490 U.S. 730, 732 (1989) (quoting statute). As the Court unanimously recognized, "[i]n the past, when Congress has used the term 'employee' without defining it..., Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 739–40 (citing cases). Under that rule, it explained, terms such as "employee," "employer," and "employment" refer to "the conventional relation of employer and employee." *Id.* at 740 (quotation marks omitted). Applying that rule, the Court held that the Copyright Act distinguished between works prepared by employees and those prepared by independent contractors. *Id.* at 751.

Similarly, *Nationwide Mutual Insurance Co. v. Darden* applied what it called the "well established principle" that "the meaning of 'employee' where the statute containing the term does not helpfully define it" is "to describe the conventional master-servant relationship as understood by common-law agency doctrine." 503 U.S. 318, 322–23 (1992) (quotation marks omitted). Thus, it held, the definition of "employee" in the Employee Retirement Income Security Act as "any individual employed by an employer" could only be interpreted as referring to the tradi-

tional "master-servant relationship." *Id.* at 323–24; *see also Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 444–45 (2003) (same interpretative approach and result with respect to Americans with Disabilities Act's similarly "circular" definition of "employee").

Indeed, the Court remarked that when it had, in two prior cases, relied on statutory context to adopt broader interpretations of terms like "employee," Congress had "amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning." *Darden*, 503 U.S. at 324–25 (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120–29 (1944); *United States v. Silk*, 331 U.S. 704, 713 (1947)); *see also* H.R. Rep. No. 80-245, at 18 (1947) (distinguishing "employees," who "work for wages or salaries under direct supervision," from "independent contractors," who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for good, materials, and labor and what they receive for the end result, that is, upon profits"). On that basis, it announced the "abandonment" of amorphous consideration of statutory context to broaden the reach of terms such as "employee." *Id.* at 325.

The FAA lacks any indication that Congress intended to depart from the well-established meaning of the term "employment." Accordingly, there is no possible basis to depart from the longstanding rule,

predating enactment of the FAA, that Congress's use of that term refers only to traditional employer–employee relationships.

B. Contemporaneous State Statutes Used Terms Such as "Employment" To Refer Only to "Employees," Not Independent Contractors

Like their federal counterparts in Congress, state legislators at the time were keenly aware that terms such as "employment" referred only to traditional employer–employee relationships, not independent contractor arrangements. And when they sought to regulate independent contractor arrangements, they used additional language to make that intention clear.

For example, when California enacted its workmen's compensation scheme in 1913, it used the terms "employer" and "employee" in the ordinary sense. The statute defined "employer" as any business or person who has an individual under a contract for hire and "employee" as "[e]very person in the service of an employer." 1913 Cal. Stat. ch. 176, §§ 13, 14, *reprinted in* U.S. Bureau of Labor, Workmen's Compensation Laws of the United States and Foreign Countries, Bulletin No. 126, at 187–215 (1913) [hereinafter BLS Bulletin No. 126]. Context makes clear that neither term was considered to reach independent contractor arrangements: an entirely separate provision of the state comprehensively addresses liability for situations involving "intermediate contractors." *Id.* at ch. 176, § 30. When California legislators sought to regulate independent

contractor arrangements, they knew well that terms like "employee" would be insufficient and that additional language specifically addressing such arrangements was required.

Similarly, Illinois's 1913 workmen's compensation scheme defined an "employer" as any business that has any person under a "contract for hire" and "employee" as "[e]very person in the service of another under any contract of hire." 1913 Ill. Laws p.335, §§ 4, 5, *reprinted in* BLS Bulletin No. 126 at 225–38. Like California, Illinois specifically addressed independent contractor liability in a separate provision, carefully tailoring such liability to fit its detailed compensation-funding scheme. *Id.* at p.335, § 31. Again, this shows that even seemingly broad definitions of terms like "employee" were understood not to encompass independent contractors.

Likewise, Kansas's 1911 workmen's compensation law too relied on the background common law to give life to its circular definitions of "employer" as "any person or body of persons corporate or unincorporate" and "workman" as "any person who has entered into the employment of or works under contract of service or apprenticeship with an employer." 1911 Kan. Sess. Laws ch. 218, § 9(h), (i) *reprinted in* U.S. Bureau of Labor, Bulletin of the United States Bureau of Labor, Bulletin No. 92, at 117–24 (1911) [hereinafter BLS Bulletin No. 92]. This law also addressed independent contractor liability in a separate provision that makes the principal liable for a contractor's employees as if they were his own. *Id.* at ch. 218, § 4(a). Of course, that provision would be

superfluous if terms like "employer" and "workman" were understood to encompass independent contractor arrangements.

The same holds true for New York's workmen's compensation scheme enacted in 1910. Not only did it define terms like employer specifically by reference to common law concepts like "authority to direct, control, and command," but it also separately imposed liability on those hiring independent contractors. 1910 N.Y. Laws ch. 352, § 1, *reprinted in* U.S. Bureau of Labor, Bulletin of the United States Bureau of Labor, Bulletin No. 90, at 709–12 (1910) [hereinafter BLS Bulletin No. 90].

Nebraska, meanwhile, adopted almost the opposite policy in its 1913 workmen's compensation statute, imposing liability on the "principal employer" for injuries sustained by employees employed by "contractors" only when the contract was an attempt to circumvent the compensation law. 1913 Neb. Laws ch. 198, pt. 2, §§ 14, 15, *reprinted in* BLS Bulletin No. 126 at 302–13. As in New York, however, the Nebraska Legislature was aware that it had to address the issue of liability for independent contractors expressly, and could not rely on general provisions addressing employers and employees. *Id.* Minnesota's 1913 workmen's compensation law took much the same approach as Nebraska's, in terms of both policy and statutory drafting. 1913 Minn. Laws ch. 467, pt. 2, § 35, *reprinted in* BLS Bulletin No. 126 at 278–301.

A number of states followed Congress's approach in the FAA, FELA, and other statutes of leaving

statutory terms like "employment" entirely undefined and yet indicated, through context, that they understood those terms to refer to traditional employer–employee relations.

For example, Connecticut's 1913 workmen's compensation law applied to any "mutual relation of employer and employee," without defining either term. 1913 Conn. Acts ch. 138, pt. B, § 1, *reprinted in* BLS Bulletin No. 126 at 215–225. But it did include a separate provision imposing liability on the "principal employer" for injuries sustained by employees directly employed by "contractors," thereby recognizing that such individuals would not fall within the ambit of the term "employee." *Id.* at ch. 138, pt. B, § 5.

Massachusetts's 1911 worker's compensation scheme followed the same general pattern, leaving the terms "employee" and "employer" undefined, while imposing liability on the principal employer for any "independent contractor" and any employees of the contractor. 1911 Mass. Acts ch. 751, § 17, *reprinted in* BLS Bulletin No. 126 at 266–77.

New York did the same in its compensation scheme for workers in certain dangerous professions, specifically imposing liability for independent contractors. 1910 N.Y. Laws ch. 674, §§ 215–16, 219(g) *reprinted in* BLS Bulletin No. 90 at 713–14.

Similarly, in 1911, when the New Jersey legislature created a cause of action for injuries to employees "arising out of and in the course of [their] employment" by an "employer," and eliminated the

common law "fellow servant" defense, it included an "independent contractor" provision. That provision imposed liability on the principal as if it were the direct employer for certain kinds of liability. 1911 N.J. Laws ch. 95, §§ 1.1–1.3, *reprinted in* BLS Bulletin No. 92 at 128–32.

Finally, Rhode Island's Workmen's Compensation Act neither defined "employee" nor addressed independent contractor arrangements. R.I. Gen. Laws §§ 1205–94 (1923). The Supreme Court of Rhode Island recognized that the term "employee" referred only to traditional employer–employee relationships. *Henry v. Mondillo*, 49 R.I. 261, 142 A. 230, 232 (1928). Accordingly, "[o]ne who contracts with another to do a specific piece of work for him, and who furnishes and has the absolute control of his assistants, and who executes the work entirely in accord with his own ideas, or with a plan previously given him by the person for whom the work is done, without being subject to the latter's orders in respect to the details of the work, with absolute control thereof, is not a servant of his employer, but is an independent contractor" and therefore outside of the Act's protections. *Id.*

In sum, contemporaneous state laws embrace the same understanding as federal law that statutory terms such as "employer," "employee," and "employment" do not encompass independent contractor arrangements. When legislatures sought to regulate such arrangements, they therefore did so expressly.

C. Courts Applying Common Law Consistently Limited Employers' Obligations to Employees, Excluding Independent Contractors

The longstanding interpretative rule expressed by this Court in *Robinson* and by so many state courts and legislatures reflects even more longstanding principles of common law distinguishing between employees and independent contractors in determining a principal's obligations.

Common law prior to the FAA's enactment consistently regarded "independent contractors" and "employees" as mutually exclusive categories. "[T]he distinction between employees and independent contractors has deep roots in our legal tradition." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721–22 (1996); *see also Pittsburgh Valve Foundry & Const. Co. v. Gallagher*, 32 F.2d 436, 438 (6th Cir. 1929) (noting that the "relationship of master and servant [i.e., employee] ...negatives the relationship of independent contractor"). The issue often arose because the common law cabined *respondeat superior* liability for negligence torts to a principal's employees, excluding independent contractors and their employees. *See, e.g., Atl. Transp. Co. v. Coneys*, 82 F. 177, 178 (2d Cir. 1897) ("The fact of a distinction between the liability of an employer for an injury caused by the negligence of his employee or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor...[was] distinctly understood.").

By 1925, virtually every jurisdiction in the United States had adopted the common law control test to determine into which of the two mutually exclusive categories a tortfeasor fell for the purpose of determining whether the principal could be subject to vicarious liability. That test generally turned on whether the principal exercised sufficient control over the means of performance of work such that the tortfeasor was its "servant." Summarizing the extant case law, this Court explained that, "[t]o determine whether a given case falls within the one class or the other [a court] must...ascertain[] who has the power to control and direct the servants in the performance of their work." *Standard Oil Co.*, 212 U.S. at 221–22; *see also id.* at 225 (discussing cases from a variety of jurisdictions).

And it is that approach that this Court recognized Congress intended to apply when it used statutory terms like "employment" without further elaboration. *Linstead*, 276 U.S. at 33–34. That was the well-recognized and settled meaning that Congress must be presumed to mean to incorporate when it uses such terms.

D. Contemporaneous Dictionaries and Treatises Reflect that Legal Language Distinguished Between "Employees" and "Independent Contractors," Just as We Do Today

Mirroring contemporary usage and understanding, legal dictionaries and secondary sources around the time of the FAA's enactment likewise recognized

the distinction between an employee and an independent contractor.

The definition of "employ" contained in the 1910 edition of *Black's Law Dictionary* specifically states that, "when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for a compensation, *and has but this one meaning* when used in the ordinary course and business of life." *Employ*, Black's Law Dictionary (2d ed. 1910) (emphasis added). Building on that approach, the 1933 and 1955 editions both explain that "'[e]mployee' must be distinguished from 'independent contractor,' 'officer,' 'vice-principal,' 'agent,' etc. The term is ofter specially defined by statutes; and whether one is an employee or not will depend upon particular facts and circumstances even though the relation of master and servant, or some other form of contractual relation does or does not exist." *Employee*, Black's Law Dictionary (3d ed. 1933) (collecting state law cases); *accord Employee*, Black's Law Dictionary (4th ed. 1955).

Consistently, legal dictionaries' definitions of independent contractor universally assume a background understanding of the control test by making express reference to the lack of a right of control over the means of the work. *Independent Contractor*, Black's Law Dictionary (2d ed. 1910) ("one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work; one who contracts to perform the work at his own risk and cost, the

workmen being his servants, and he, and not the person with whom he contracts, being liable for their fault or misconduct"); *Independent Contractor*, 2 Bouvier's Law Dictionary and Concise Encyclopedia (Rawles rev. ed. 1914) (a person who, "exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work," that the term "denote[s] one who has the right to select, employ, and control the action of the workmen," and that "[i]n the cases of an independent contract, the employer is not responsible....[a] like rule governs the question of the liability of the employer and the contractor for the negligence and torts of the sub-contractor or his servants," and further noting at 1535 that "independent contractors" provide "employment" for "employé[s]," and moreover noting extensive Anglo-American case law at 1534–36 distinguishing between independent contractor and employee liability at common law); *accord Independent Contractor* Bouvier's Law Dictionary: Baldwin's Student's Edition (William Edward Baldwin ed. 1934); *Independent Contractor*, Ballantine's Law Dictionary (1916) (defining the term as one "who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work").

The same is true of contemporaneous treatises examining the term "independent contractor." *E.g.*, Theophilus J. Moll, A Treatise on the Law of Independent Contractors & Employers' Liability (1910)

(an independent contractor is one who has "independence of control in employing workmen and selecting the means of doing the work").

In short, the relevant legal authorities reflect the same distinction as the common law, statutory law, and courts' decisions interpreting statutes, consistently holding that employees and independent contractors are by default separate, mutually independent categories. And that holds true to this day. *E.g.*, *Independent Contractor* Black's Law Dictionary (9th ed. 2009) (noting that an independent contractor is "unlike an employee").

II. Statutory History Confirms that the FAA's "Contract of Employment" Exemption Is Limited To Traditional Employer–Employee Relationships

While it would be sufficient in this case for this Court to apply the longstanding rule that terms such as "employment" refer only to traditional employer–employee relationships, the historical context in which the FAA was enacted confirms that Congress actually did intend to so limit the scope of the Section 1 exemption. In particular, Congress sought to exclude from the FAA's mandate employment agreements that were or would soon be subject to specialized dispute-resolution procedures under federal law that might conflict with the FAA's generally applicable arbitration requirement. This historical context explains why Congress structured the Section 1 exemption as it did, and the statutory history demonstrates how specifically Congress relied upon

the traditional, common law meaning of the term "employment" to cover a precise class of employees whom it sought to exempt from the FAA's reach.

A. The Historical Context in Which the FAA Was Enacted Confirms that the Exemption's Scope Is Limited to Certain Employees

In *Circuit City*, this Court correctly recognized that Section 1 of the FAA exempts "contracts of employment" only for transportation employees rather than other employment sectors. *Circuit City*, 532 U.S. at 119. Arriving at that conclusion required acknowledgement of Section 1's specific enumeration of "seamen" and "railroad employees" and the rule of *ejusdem generis*. *Id.* at 114. That is, the general phrase, "any other class of workers engaged in...interstate commerce" was controlled by the discrete categories of employees that proceeded it. *Id.* at 115. This made sense, both as a matter of historical context and legislative craft, because in the post-World War I labor and employment environment, it was "rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Id.* at 121. Namely, it was "reasonable to assume that Congress excluded 'seamen' and railroad workers from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.*

It follows directly what Congress meant by "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," according to the same rules of construction applied in *Circuit City*, controls the scope of those transportation workers excluded from FAA coverage under the Section 1 exemption. Crucially, the statutory dispute-resolution schemes discussed in *Circuit City*, which were either established or in the drafting stage at the time of the FAA's enactment, applied only to employees—not independent contractors.

This Court has recognized as much. As early as 1930, this Court construed the Railway Labor Act of 1926, Pub. L. 69-257, 44 Stat. 577 (May 20, 1926), as an employee-protection statute governing the right of employees under a collective bargaining agreement to choose their representative: "[t]he statute is not aimed at this right of the employers, but at the interference with the right of employees to have representatives of their choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds." *Texas & New Orleans R. Co. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 571 (1930).

The RLA was an answer to the flawed Transportation Act of 1920, which failed to adequately solve the labor problems affecting management and employees within the rail industry. The situation leading to the RLA—at the same time Congress drafted

and passed the FAA—was one in which railroad "'employees absolutely refuse to appear before the labor board.... [I]ts authority is not recognized or respected by the employees and by a number of important railroads.'" *Id.* at 563 (quoting S. Rep. No. 222 (1926)). Indeed, the shortcomings of the Transportation Act of 1920 centered on the fact that labor board decisions—involving railroad employees—were not enforceable.

Those shortcomings led to the RLA, which was "the product of a negotiation between employers and employees." Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 198 (1926) (statement of D.R. Richberg). Both the Republican and Democratic party platforms called for change to the Transportation Act in 1924,[2] which is the same year that Congress introduced the Howell-Barkley bill that launched the negotiations over the RLA.[3] Against that backdrop, representatives of the rail employers "and all the employees in one industry conferred for several months of the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community." *Id.* That is, everything that the RLA

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[2] 1 National Party Platforms 246, 263 (Donald B. Johnson ed., Univ. of Ill. Press, rev. ed. 1978).

[3] Douglas W. Hall & Michael L. Winston, The Railway Labor Act (4th ed. 2016).

concerned as Congress debated it and eventually passed it was directed toward railroad employees covered by collective bargaining agreements. The RLA does not and cannot apply to non-employee independent contractors. That much is explained at the outset of the statutory language:

> The purposes of the chapter are: ... (2) to forbid any limitation upon freedom of association among *employees* or any denial, as a condition of employment or otherwise, of the right of *employees* to join a labor organization; ... (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

45 U.S.C. § 151a (emphasis added).

Not only that, but the RLA defines "employee" using the common law approach to the term—limiting its coverage to those persons in service of the carrier "(subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official." 44 Stat. 577, 577, at § 1.

So when Congress excluded "railroad employees" from Section 1 of the FAA because of "the developing statutory dispute resolutions schemes covering spe-

cific workers," it did so with the knowledge that the workers covered by the developing RLA scheme were by definition employees and not independent contractors. *See Circuit City*, 532 U.S. at 121.

The same is true for seamen. The Jones Act, enacted in 1920 to provide a cause of action for injured seamen, borrowed the meaning of employee from the Federal Employers' Liability Act, which was limited to railroad "employee[s]." 45 U.S.C. § 51. Even before the FAA was passed, this Court had already settled that "employee" and "employed" as used in FELA were "intended to described the conventional relation of employer and employee." *Robinson*, 237 U.S. at 95. That is precisely the framework that the Jones Act built upon when it provided that "[a] seaman injured in the course of employment...may elect to bring a civil action at law...against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U.S.C. § 30104. Before the Jones Act, the Shipping Commissioners Act of 1872 protected a "person seeking employment as a seaman" from unlawful employment fees. 17 Stat. 262, 264 (June 7, 1872). Once again, when Congress excluded seamen from Section 1 of the FAA, the exemption referenced seamen as employees—not independent contractors—based on the established statutory dispute resolution framework in place in 1925.

Guided by this Court's *ejusdem generis* rule of construction applied in *Circuit City*, Sections 1's exemp-

tion can only extend to transportation *employees*, as opposed to independent contractors. After all, those were the only types of workers covered by "established or developing statutory dispute resolution schemes" that Congress did not want to unsettle in passing the FAA. *See Circuit City*, 532 U.S. at 121.

B. The Statutory History of the FAA Confirms the Exemption's Limited Scope

The statutory history of the Section 1 exemption confirms what the historical context suggests: that Congress sought to exclude specifically classes of employees—and not independent contractors—from FAA coverage and used the well-understood term "contracts of employment" to do so.

What became the FAA was first introduced in 1922 by Senator Thomas Sterling and Congressman Ogden Mills. Comm. on Commerce, Trade, and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925); Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 14 (1923) (letter of Secretary of Commerce Herbert Hoover) [hereinafter 1923 Hearing]. Originally drafted by the American Bar Associ-

ation, the bill did not include an exemption for "contracts of employment."[4]

The International Seamen's Union of America, through its President Andrew Furuseth, and the American Federation of Labor, promptly objected. They were "concern[ed] that the legislation might authorize federal judicial enforcement of arbitration clauses" in seamen's employment contracts.[5] *See Circuit City*, 532 U.S. at 127 & nn.5–8 (Stevens, J., dissenting); Proceedings of the 26th Annual Convention of the International Seamen's Union of America 204 (1923) (statement of Andrew Furuseth, presi-

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[4] 1923 Hearing at 14 (letter of Secretary of Commerce Herbert Hoover).

[5] Furuseth had secured the passage of the Seamen's Act of 1915, 38 Stat. 1164 (Mar. 4, 1915). The Act provided seamen with certain rights he believed would be taken away by a statute making agreements to arbitrate enforceable. Seamen were required by statute to sign individual contracts of employment termed "shipping articles." 46 U.S.C. § 10302 (1994). These "articles" were individual written contracts of employment requiring the seamen to work on a specified voyage and the employer to provide certain benefits. Furuseth stated that there had arisen a practice of including in "articles" something not required by statute: an agreement to arbitrate disputes before a shipping commissioner or, if in a foreign port, before a United States consul. Such an arbitration, in Furuseth's opinion, would constitute "compulsory labor" because an arbitrator might require a seaman to remain on or return to a ship even though under the Seamen's Act he would have the right to leave, forfeiting only pay. He was therefore against enforcement of agreements to arbitrate. *See* Proceedings of the 26th Annual Convention of the International Seamen's Union of America at 83-84; *id.* at App. I, 203–05 (1923).

dent of the International Seamen's Union); *id.* at 203 (noting that the then-proposed FAA was a "compulsory labor" and "forced or involuntary labor" bill); Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 467 n.2 (1957) (Frankfurter, J., dissenting).

Accordingly, in hearings on the bill in 1923, the Senate Judiciary Committee and the American Bar Association explained that the bill was not intended to affect contracts of employment of seamen or the railway industry. The main sponsor of the bill, Senator Sterling, asked the representative of the ABA directly about the "objection raised against it" by the Seamen's Union. Speaking for the American Bar Association at the hearings, "the chairman [of the ABA drafting committee] at the time this matter was formulated," W. H. H. Piatt, noted the objection that the FAA would "compel[] arbitration of the matters of agreement between the stevedores and their employers," 1923 Hearing at 9, and retorted that "[i]t was not the intention of this bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense." *Id.* Accordingly, Mr. Piatt offered language for an amendment to clarify that point: "'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.'" *Id.*; *see also id.* at 10 (statement of Senator Sterling) (noting the "suggested amendment" by Mr. Piatt in response to an inquiry about railroad construction contracts).

Then-Secretary of Commerce Herbert Hoover submitted a letter for the record in those hearings, stating that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by saying 'but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate of foreign commerce.'" 1923 Hearing at 14. That letter is the first appearance of the exact language of the exemption clause in the legislative or drafting history.

When the bill was reintroduced in the next session of Congress, it included Secretary Hoover's language—the exemption clause. This inclusion pacified the labor-union objections, and the FAA became law. *E.g.*, *Circuit City*, 532 U.S. at 127 (Stevens, J., dissenting); *Textile Workers*, 353 U.S. at 466–67 & n.2 (Frankfurter, J., dissenting); Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925) ("Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that 'nothing herein contained shall apply to contracts of employment of seamen, railroad employe[e]s or any other class of workers engaged in foreign or interstate commerce.' This exempted labor from the provisions of the law, although its sponsors denied there was any intention to include labor disputes.").

All of the debate surrounding the Section 1 exemption concerned workers who, because they were traditional employees and typically represented by la-

bor organizations, were or would be subject to special dispute-resolution schemes incompatible with the FAA. The history of Section 1 therefore rejects the conclusion of the court below that Congress's use of the term "contracts of employment" was somehow intended to reach a broader class of workers that includes independent contractors.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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